

1 Scott P. Nealey (CA Bar No. 193062)
2 NEALEY LAW
3 71 Stevenson, Suite 400
4 San Francisco, CA 94015
5 Ph: 415.231.5311; fax: 415.231.5313
6 snealey@nealeylaw.com

7 *(other counsel listed on signature page)*

8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA

10 IN RE: VOLKSWAGEN “CLEAN DIESEL”
11 MARKETING, SALES PRACTICES, AND
12 PRODUCTS LIABILITY LITIGATION

MDL No. 2672 CRB (JSC)

13 This Document Relates to:

14 ALL ACTIONS

**RESPONSE TO BRIEF OF AMICUS
CURIAE THE COMPETITIVE
ENTERPRISE INSTITUTE’S
CENTER FOR CLASS ACTION
FAIRNESS**

15
16 Plaintiffs in certain Washington state actions and their undersigned counsel, appointed
17 prior to transfer as interim class counsel for Washington residents, hereby respond to the brief
18 of amicus curiae, The Competitive Enterprise Institute’s Center for Class Action Fairness
19 (CCAF) [Dkt #576]. Plaintiffs initially note that CCAF has no interest in this litigation, but
20 instead is an issue-oriented organization representing its own political views. The amicus brief
21 does not say whether CCAF owns a Volkswagen, or represents a Volkswagen owner. The fair
22 assumption then is that it does neither.
23

24 An auction bidding process is inappropriate here and would be conducive to undesirable
25 results. Auction bidding might simply create incentives via a reverse auction for lawyers to
26 settle too early for too little, which is perhaps the outcome that the amicus actually seeks.
27
28

Moreover, the premise for auction bidding offered by CCAF—that fees otherwise will be too high—presupposes that the Court will not do its job of determining that fees are reasonable. To the contrary, this Court, this district, and this circuit have a long history of overseeing fee requests with much scrutiny.

THE AMICUS CURIAE HAS NO INTEREST IN THIS LITIGATION

CCAF is a political advocacy organization *possibly funded* in part by Volkswagen.¹

While ostensibly representing the interests of consumers here, its attack on class action plaintiff lawyers is part of a bigger agenda embracing purported “sound science” to defend the corporate interests that support it. Auction based attorney fees is part of that “sound science.”²

The Competitive Enterprise Institute (CEI), of which CCAF is a part, is an advocacy group based in Washington DC with long ties to tobacco disinformation campaigns and more recently to climate change denial.³ It calls itself “a non-profit, public policy organization dedicated to advancing the principles of limited government, free enterprise, and individual

¹ See *Response re Motion to File Amicus Curiae Brief* [Dkt #512]; but see *Declaration of Theodore H. Frank in Opposition to Opposition/Response to Motion* [Dkt #548].

² “Sound science” is a phrase often used by corporate public relations and government agency spokesmen to describe the scientific research used to justify a claim or position. Sound science, however, has no specific scientific definition itself, so the phrase is used subjectively. “Sound science” is not a synonym of “good science” practices, but rather it is an ideological policy statement more about the criteria for the use of science in policy making. It is invoked mostly to call into question the validity of a given study or scientific statement. Source Watch, *Sound Science*, available at: http://www.sourcewatch.org/index.php/Sound_science (last viewed Jan 7, 2016).

³ Source Watch, *Competitive Enterprise Institute*, available at: http://www.sourcewatch.org/index.php/Competitive_Enterprise_Institute#cite_note-1 (last visited Jan. 7, 2016) (“Source Watch / CEI”).

liberty.”⁴ It postures itself as an advocate of “sound science” in the development of public policy.

In 1986, it began its “free market legal program,” which seeks to overturn government regulations that the CEI regards as inappropriate, such as regulations pertaining to drug safety, rent control, and automobile fuel efficiency.⁵ Since 1992, CEI has actively advocated against environmental laws and environmental education in the classroom, claiming for example in various publications that dioxin is good for you⁶ and that that naturally-occurring chemicals produced by plants and other living organisms are as dangerous as industrial chemicals.⁷

Many of its claims have been debunked. Here are a few examples related to climate change:

- Annenberg Political Fact Check, *Scientist to CEI: You Used My Research To Confuse and Mislead*, May 26, 2006 (link deactivated);
- Real Climate, *Thank you for emitting*, May 18, 2006, available at: <http://www.realclimate.org/index.php/archives/2006/05/thank-you-for-emitting> (last viewed Jan. 7, 2016);
- News Bureau, University of Missouri-Columbia, *MU Professor Refutes National Television Ads Downplaying Global Warming: Engineering Professor Curt Davis says TV Spots are Misrepresenting His Research*,

⁴ Competitive Enterprise Institute, *About CEI*, available at: <https://cei.org/about-cei> (last viewed Jan. 7, 2016).

⁵ *Source Watch / CEI*.

⁶ Michael Fumento, *Rachel's Folly: The End of Chlorine*, Competitive Enterprise Institute, February 29, 1996, available at: <https://cei.org/search/node/rachel%27s%20folly> (last viewed Jan. 7, 2016).

⁷ Jonathan Tolman, *Nature's Hormone Factory: Endocrine Disrupters in the Natural Environment*, Competitive Enterprise Institute, January 31, 1996, available at: <https://cei.org/studies-issue-analysis/natures-hormone-factory-endocrine-disrupters-natural-environment> (last viewed Jan. 7, 2016).

May 19, 2006, *available at*:

<http://munews.missouri.edu/NewsBureauSingleNews.cfm?newsid=9842>

(last viewed Jan. 7, 2016).

This is not a situation where CCAF and its lawyers represent an objector with an interest in the litigation. *Cf. In re Transpacific Passenger Air Transp. Antitrust Litig.*, C 07-05634 CRB, 2015 WL 4776946 (N.D. Cal. Aug. 13, 2015). CCAF represents no one other than itself, its “donors,” and their political agenda.

As the parties properly before the Court are represented by competent counsel, the words of CCAF, who has no interest here or in any similar case, *see N. Sec. Co. v. United States*, 191 U.S. 555, 556 (1903) (leave to file denied), should be afforded little weight. Certainly, CCAF has no “unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.” *Ryan v. Commodity Futures Trading Com'n*, 125 F.3d 1062, 1063 (7th Cir. 1997) (citing *Miller-Wohl Co. v. Commissioner of Labor & Industry*, 694 F.2d 203 (9th Cir.1982)(per curiam)).

AUCTION BASED FEES ARE NOT SUPERIOR, ESPECIALLY HERE

Competitive bidding is an approach taken by some courts in an effort to avoid some of the problems associated with the lodestar method. As has been noted by Wright & Miller:

Judge Walker of the Northern District of California has ruled in several cases that class counsel and their compensation would be determined by allowing competitive bidding between firms as to who should represent the class. And at least one other court has adopted that technique, although it has been seriously critiqued. Judge Easterbrook offered the following analysis:

There is, moreover, considerable question just what is being auctioned in bidding to represent a class. Normally an auction specifies the precise product to be sold (a particular painting, a share of stock in a named corporation, or 5,000 cubic yards of concrete having defined attributes). For legal services, however, it is hard if not impossible to hold the quality dimension constant. Contingent-fee arrangements are used when it is difficult to monitor counsel

1 closely; otherwise some different arrangement, such as hourly rates,
 2 is superior. ... When it is hard to monitor counsel's effort and other
 3 elements of quality, it is also hard to know what the bid represents.
 4 Maybe it shows that less work will be invested, and that less
 5 compensation then is required. ... Lawyers will earn a competitive
 6 return even at the lower level of compensation, but the class may be
 7 worse off. Large and sophisticated purchasers of legal services, such
 8 as Exxon/Mobil and General Motors, do not acquire legal services
 9 at auction; even clients able to monitor lawyers closely may be
 10 worried about the effect of the auction process on quality.

11 § 1803.1 *Attorney Fees—Standards for Assessing*, 7B Fed. Prac. & Proc. Civ. § 1803.1 (3d ed.)
 12 (quoting *In re Synthroid Mktg. Litig.*, 325 F.3d 974, 979 (7th Cir. 2003)) (citations omitted).

13 In an article published in the Columbia Law Review, the author argues that the selection
 14 and retention of lead counsel by empowered lead plaintiffs is preferable to utilizing auctions to
 15 select lead counsel, finding, after a detailed examination, that lead-counsel auctions present
 16 serious problems and have serious shortcomings. The author concludes:

17 Careful scrutiny reveals that auction advocates have overlooked substantial
 18 methodological problems with the design and implementation of the lead counsel
 19 auction. Even if these problems were overcome, the auction procedure is flawed:
 20 Auctions are poor tools for selecting firms based on multiple criteria, compromise
 21 the judicial role, and are unlikely to produce reasonable fee awards.

22 Jill E. Fisch, *Lawyers on the Auction Block: Evaluating the Selection of Class Counsel by*
 23 *Auction*, 102 Colum. L. Rev. 650 (2002).

24 The perceived abuses of class action counsel have been addressed by means other than
 25 auctions. For example, the Class Action Fairness Act provides specific directions to courts
 26 regarding how to calculate fees in cases involving coupon settlements. These include setting the
 27 fee based on the value to the class members of the coupons redeemed, or, when injunctive relief
 28 also is included, using the lodestar method to set the fee award. These requirements are meant to
 address perceived settlement abuses when counsel receive large fees, but the awards to class

1 members have little or no value. 7B Fed. Prac. & Proc. Civ. § 1803.1 (citations omitted).

2 In the case at bar, although liability is admitted to some degree and while settlement
3 seems near, the course of the case is not well established. No “fix” for the problem has been
4 announced or proposed, and Volkswagen appears to be at loggerheads with the EPA according
5 to multiple reports. Presently, there is no data, nor could there be absent a “fix,” of the future
6 value of Class member’s vehicles. Accordingly, the amount of work involved in reaching a fair
7 and full resolution of the issues is unknown and unknowable at this time. Under these
8 circumstances, an auction is simply likely to provide additional pressure for a quick settlement
9 and would empower those willing to bid low seeking one.
10
11

12 Additionally, an auction will reduce diversity of representation of class interests.
13 Counsel who are willing or able to work for less—either as an individual firm or as a group—
14 may be less capable of fully and fairly representing the various interests in the litigation where,
15 as here, they are diverse. “Attorneys have legitimate concerns that their clients’ interests be
16 adequately represented.” *Manual for Complex Litigation* § 10.224 (4th ed. 2004). For these
17 reasons, the judge is advised to take an active part in the decision on the appointment of counsel
18 and to consider a list of factors including “whether designated counsel fairly represent the
19 various interests in the litigation—where diverse interests exist among the parties, the court may
20 designate a committee of counsel representing different interests....” *Id.*
21
22

23 Finally, the likelihood of windfall fees raised by the amicus is not present in this
24 case. Any “fee” request will – as it was by this Court and Judge Fern M. Smith in *In Re*
25 *Bextra/Celebrex*, MDL 1699 – be carefully reviewed both as to the work that was done and the
26 total compensation. Well established Ninth Circuit case law calling for various cross checks,
27 see e.g., *In re Bluetooth Headset Products Liab. Litig.*, 654 F.3d 935 (9th Cir. 2011), and this
28

1 Court's prior practice to look carefully at fee requests, will ensure not only that any fee award is
2 fair and reasonable (and not an early, too cheap deal, designed to benefit only a few counsel
3 negotiating in secret), but also that the fee awarded reflects the work done and its value to the
4 members of the Class.
5

6 CONCLUSION

7 For all of these reasons, Washington Plaintiffs asks the Court to give little weight, if any,
8 to the arguments of amicus curiae for the use of competitive bidding in the selection and
9 compensation of counsel.
10

11 Respectfully submitted,

12 /s/ Scott P. Nealey
13 Scott P. Nealey (Cal Bar No. 193062)

14 NEALEY LAW
15 71 Stevenson, Suite 400
16 San Francisco, CA 94015
17 Ph: 415.231.5311; fax: 415.231.5313
snealey@nealeylaw.com

18 Debra Brewer Hayes (*pro hac vice applied for*)
19 dhayes@dhayeslaw.com
20 Charles Clinton Hunter (CA Bar No 93987)
chunter@dhayeslaw.com
21 THE HAYES LAW FIRM, PC
22 700 Rockmead, Suite 210
23 Houston, TX 77027
281-815-4963 Tel
832-575-4759 Fax

24 Stephen M. Hansen (*pro hac vice to be applied for*)
25 Law Offices of STEPHEN M. HANSEN, P.S.
26 1821 Dock Street
Tacoma, WA 98402
27 Ph: 253.302.5955; fax: 253.301.1147
steve@stephenmhansenlaw.com
28

*Interim Class Counsel for Washington State Residents and
Counsel for April Sims, Breck Lebegue, Amy Johnson, and
Mathhew Slichko*

CERTIFICATE OF SERVICE

I hereby certify that I served the forgoing through the Court's CM/ECF system upon all
counsel registered with that system.

Dated: January 8, 2016.

/s/ Charles Clinton Hunter

CHARLES CLINTON HUNTER